

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION**

**FILED**

NOV 04 2024

CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY 1047 DEPUTY

**Case No. 5:24-cv-00769-XR**

MARK ANTHONY ORTEGA

Plaintiff,

v.

CARLOS HERRERA AND FUNDCUBE INC.  
D/B/A FUNDQUBE,

Defendants.

**PLAINTIFF'S MOTION FOR CLERK'S ENTRY OF DEFAULT**

Plaintiff, Mark Anthony Ortega ("Plaintiff"), requests that the Clerk of Court enter default against Defendant Carlos Herrera ("Herrera"), pursuant to Federal Rule of Civil Procedure 55(a). In support of this request, Plaintiff states the following:

**SUMMARY**

1. The proof of service (ECF No. 8) demonstrates that Herrera was properly served with a copy of Plaintiff's Original Complaint (ECF No. 1) in this case on September 25, 2024.
2. More than twenty-one (21) days have elapsed since the date of service of process, and Herrera has failed to answer, challenge, or otherwise defend as required by Federal Rule of Civil Procedure 12(a)(1)(A) and as demonstrated by the record in this action and by the Declaration of Mark Anthony Ortega filed concurrently with his motion.

**BACKGROUND**

3. On July 22, 2024, Plaintiff filed his First Amended Complaint (ECF No. 4) against Herrera in this suit seeking monetary relief for violations of the Telephone Consumer

Protection Act (“TCPA”), 47 U.S.C. § 227 et seq., and the Texas Business and Commercial Code, Chapter 302.

4. Plaintiff properly served EL Realty with the Complaint and Summons on September 25, 2024 (ECF No. 8).

5. Herrera has not appeared in this action.

### **ARGUMENTS AND AUTHORITIES**

6. The Clerk of Court must enter a default against a party who has not filed a responsive pleading or otherwise defended the suit. Fed. R. Civ. P. 55(a); *see N.Y. Life Ins. Co. v. Brown*, 84 F.3d 137, 141 (5th Cir. 1996).

7. The Clerk should enter a default against Herrera because he did not file a responsive pleading within 21 days of service. Fed. R. Civ. P. 12(a)(1)(A)(i); Fed. R. Civ. P. 6(d); *see* Fed. R. Civ. P. 55(a).

8. The Clerk should enter a default against Herrera because he did not otherwise defend the suit. Fed. R. Civ. P. 55(a).

9. Because Herrera did not file a responsive pleading or otherwise defend the suit, it is not entitled to notice of entry of default. *See* Fed. R. Civ. P. 5(a)(2); *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 141-42 (5th Cir. 1996).

10. Plaintiff is therefore, entitled to entry of default against Herrera because he has failed to file an answer to the Original Complaint or any other responsive pleadings. This entry of default is authorized by Rule 55 of the Federal Rules of Civil Procedure.

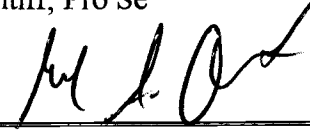
### **PRAYER**

For the foregoing reasons, Plaintiffs respectfully request the Clerk of Court to enter a default against Defendant Herrera in this matter.

Dated: October 30, 2024

Respectfully submitted,

Mark Anthony Ortega  
Plaintiff, Pro Se

By: \_\_\_\_\_

mortega@utexas.edu

PO Box 702099

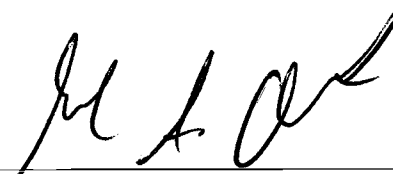
San Antonio, TX 78270

Telephone: (210) 744-9663

### **CERTIFICATE OF SERVICE**

I hereby certify that on October 30, 2024, I mailed the foregoing via first class mail for traditionally filing with the clerk of court for the U.S. District Court, Western District of Texas, and served a true and correct copy of this document on the parties and/or attorneys of record via first class mail to Defendant at the following address:

Carlos Herrera  
1207 13<sup>th</sup> St,  
Imperial Beach, CA 91932

  
\_\_\_\_\_  
Mark Anthony Ortega

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CARLOS HERRERA AND FUNDQUBE INC.  
D/B/A FUNDQUBE,

Defendants.

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**DECLARATION IN SUPPORT OF CLERK'S ENTRY OF DEFAULT**

I hereby certify that I, Mark Anthony Ortega, am the Plaintiff in the above cause, and that defendant Carlos Herrera was served on September 25, 2024 as evidenced by the Proof of Service. (ECF No. 8)

I further certify that the defendant has failed to serve an answer or other responsive pleading; the defendant is neither an infant (under age 21) nor an incompetent person; the defendant is not in the active military service of the United States of America or its officers or agents or was not six months prior to the filing of the case. Therefore, the Clerk is requested to enter a default against said defendant.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: October 30, 2024

Mark Anthony Ortega  
Plaintiff, Pro Se

By: 

mortega@utexas.edu

PO Box 702099

San Antonio, TX 78270

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**CLERK'S ENTRY OF DEFAULT**

The Plaintiff, Mark Anthony Ortega, having filed a Complaint (ECF No. 1) on July 11, 2024, as well his First Amended Complaint (ECF No. 4) on July 22, 2024 and the Defendant, Carlos Herrera having failed to plead or otherwise defend as required by the Federal Rules of Civil Procedure, and the time for responding having expired;

IT IS ORDERED, that the Clerk enter the default of the Defendant, Carlos Herrera.

By: \_\_\_\_\_  
Clerk of Court

Po Box 702099  
San Antonio, TX 78270

RECEIVED

NOV - 4 2024

CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY \_\_\_\_\_  
DEPUTY CLERK

NOV 4 2024 10 00 AM  
CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS

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NOV - 4 2024

CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
BY \_\_\_\_\_  
DEPUTY CLERK

U.S. District Clerk's Office  
262 West Nueva Street, Room 1-400  
San Antonio, TX 78207

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